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90-882

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PAULA PHELAN, et al.,

Petitioners,

vs.

MICHAEL TAYLOR, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBIT THE EXERCISE OF LONG-ARM JURISDICTION OVER STATE AGENTS AND STATE AGENCIES WHERE THE CAUSE OF ACTION IS BASED UPON ALLEGATIONS THAT DEFENDANTS DEFICIENTLY DISCHARGED THEIR SOVEREIGN RESPONSIBILITIES AND DEFENDANTS HAVE HAD WITH THE FORUM STATE ONLY ISOLATED CONTACTS INCIDENTAL TO THE PERFORMANCE OF THOSE RESPONSIBILITIES?

II. DO STATE LAW ENFORCEMENT OFFICERS PURPOSEFULLY AVAIL THEMSELVES OF THE PRIVILEGE OF CONDUCTING BUSINESS IN ANOTHER STATE WHEN THEY MAKE CONTACTS THAT ARE INCIDENTAL TO THE INVESTIGATION OF AN ALLEGED CRIME THAT OCCURRED WITHIN THEIR JURISDICTION?

III. WHERE STATE LAW ENFORCEMENT OFFICERS ARE SUED FOR ALLEGEDLY FAILING TO MAKE A TIMELY ARREST, DOES THE CAUSE OF ACTION ARISE OUT OF INCIDENTAL CONTACTS THEY HAVE WITH THE FORUM STATE IN THE COURSE OF THEIR INVESTIGATION?

IV. ARE STATE LAW ENFORCEMENT OFFICERS, ACTING WITHIN THE SCOPE OF THEIR DUTIES AS SUCH, AGENTS OF THOSE WHO OPERATE THE LAW ENFORCEMENT AGENCY, WHERE THE OFFICIALS ARE SUED IN THEIR INDIVIDUAL CAPACITIES?

PARTIES

Petitioners, defendants below, are Paula Phelan, a member of the Kansas City, Missouri Police Department (the "Department"), and Richard Berkley, Arthur D. Brookfield, II, Beverly Barker Nicks, John L. Williams, Michael B. Meade, and Larry Joiner, who plaintiffs allege are members of the Kansas City, Missouri Board of Police Commissioners, an agency of the State of Missouri. All defendants have been sued in their individual and official capacities. Respondents, plaintiffs below, are Michael and Brenda Taylor, husband and wife, who have sued in their own right and as parents and guardians of Michael Andrew Taylor, a minor, and as the heirs of Jessica Taylor, deceased.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported: *Taylor v. Phelan*, 912 F.2d 429 (10th Cir. 1990). The slip opinion is set forth at Appendix A. The opinion of the United States District Court for the District of Kansas is not reported. It is contained in Appendix C.

JURISDICTION

The judgment sought to be reviewed was entered by the Tenth Circuit Court of Appeals on August 27, 1990. On September 10, 1990, defendants filed a timely Petition for Rehearing, with Suggestion for Rehearing En Banc. The Tenth Circuit denied that Petition by an Order filed October 12, 1990.

This Court has jurisdiction to review the judgment of the Tenth Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The exercise of personal jurisdiction over defendants must be tested against the due process clause of the Fourteenth Amendment to the United States Constitution and against the Kansas long-arm statute, K.S.A. § 60-308. Only constitutional questions have been presented for review by this Court.

STATEMENT OF THE CASE

Plaintiffs allege that, on November 13, 1986, Michael Moore, a relative of plaintiff Michael Taylor, broke into the Taylors' home, shot Michael Taylor, struck Brenda Taylor, poured flammable liquid on young Michael and Jessica Taylor, set them afire, and then killed himself. They claim that defendants are liable for the damages plaintiffs sustained as a result of Moore's actions because defendants did not effect Moore's arrest after plaintiffs

reported, on October 22, 1986, that he had sexually abused Jessica Taylor.

The Tenth Circuit held that the exercise by a Kansas court of personal jurisdiction over these Missouri law enforcement officers complied with due process. That holding is based on two discreet contacts plaintiffs allege members of the Department had with Kansas in the course of their investigation of plaintiffs' abuse report. First, plaintiffs allege that, while defendant Phelan was at the Taylor's home in Kansas, she assured them that they "would be safe from physical assault and harm." Petition, ¶18. Second, plaintiffs contend that when the Circuit Court of Clay County, Missouri issued a warrant for Moore's arrest on the abuse charge, Detective Brad Wessler, who is not a defendant, telephoned Moore in Kansas and requested that he return to Kansas City, Missouri to be processed.

Plaintiffs live in Kansas City, Kansas. In October of 1985, they, with their two young children, visited friends in Kansas City, Missouri. They were joined by Moore. On September 25, 1986, Jessica Taylor told her parents that, during that visit, Moore had touched her vagina and caused her to touch his penis. A month later, plaintiffs reported the matter to the Department.

Defendant Phelan, who was then a detective in the Sex Crimes Unit of the Department, took plaintiffs' report and interviewed Jessica Taylor, on October 22, 1986. Pursuant to directions from the Clay County prosecuting attorney, she conducted further investigation before asking the prosecutor to apply for an arrest warrant. That investigation included attempts to obtain a polygraph examination from Moore, who voluntarily appeared at

Department headquarters and gave a statement, but did not take a polygraph exam, and collection of medical reports that might have provided physical evidence of the occurrence of an assault. The Taylors had Jessica examined by a doctor and, because it would have been inconvenient for Mrs. Taylor to bring the report of that examination to Kansas City, Missouri, defendant Phelan volunteered to pick it up at the Taylor home. It was during this visit that defendant Phelan allegedly "assured" plaintiffs of their "safety". The visit occurred approximately two weeks before Moore attacked plaintiffs and it is the only occasion pertinent to the court of appeals' decision on which any member of the Department was in Kansas.

After completing her investigation, defendant Phelan turned over its results to the Clay County prosecuting attorney. The prosecutor applied for a warrant for Moore's arrest and, on Friday, November 7, 1986, the Clay County Circuit Court issued one. On that date, Detective Wessler called the prosecutor's office and was advised of the issuance of the warrant.

Moore lived and worked in Kansas. Therefore, the Department had no authority to execute the warrant. Since Moore had previously indicated his willingness to cooperate, Wessler telephoned him, advised him of the issuance of the warrant, and requested that he come to Kansas City, Missouri to be processed. When he made the call, Wessler was in Missouri and Moore was in Kansas. Though Moore stated that he was willing to appear voluntarily, he did not.

On the evening of November 10, 1986, Clay County entered the issuance of the arrest warrant into a regional

computer network in which the Department is a participant. That computer entry authorized the Department to request that Wyandotte County, Kansas law enforcement officers execute the warrant. On November 11, 1986, defendant Phelan contacted the Wyandotte County Sheriff's Department and asked that they do so. However, Wyandotte County was unable to serve the warrant before Moore attacked the Taylors.

Plaintiffs commenced this action in the district court of Wyandotte County, Kansas. Service was effected in Missouri, pursuant to K.S.A. § 60-308, the Kansas long-arm statute, by delivering a copy of the Summons and Petition to the Department's legal advisor. The parties stipulated that accepting service in this manner would not affect defendants' right to contest personal jurisdiction.

The Petition alleges that defendants' failure to arrest Moore deprived plaintiffs of constitutional rights, giving rise to an action under 42 U.S.C. § 1983. It also alleges that defendants were negligent, giving rise to State law claims, including claims under the Kansas Tort Claims Act. The Kansas Tort Claims Act provides a limited waiver of sovereign immunity for Kansas governmental entities.

Defendants removed the action to the United States District Court for the District of Kansas. Jurisdiction in the district court was based on 28 U.S.C. § 1331, since plaintiffs alleged an action arising under the Constitution of the United States, and on 28 U.S.C. § 1332, since all plaintiffs are citizens of the State of Kansas and all defendants are citizens of the State of Missouri.

After removal, defendants filed a Motion for Judgment on the Pleadings, seeking dismissal on grounds of lack of personal jurisdiction. With their opposition, plaintiffs submitted materials outside the pleadings and the district court therefore, pursuant to Rule 12(c), Fed. R. Civ. P., treated the motion as one for summary judgment. On October 13, 1988, the district court granted defendants' motion, holding that defendants did not have sufficient minimum contacts to demonstrate a purposeful availment of the privilege of conducting business within the State of Kansas and that, therefore, exercising jurisdiction over the persons of defendants would violate due process. After an unsuccessful request for reconsideration, plaintiffs appealed.

The Tenth Circuit reversed. It held that defendant Phelan's courtesy visit to Kansas and Detective Wessler's phone call to Moore each provided a sufficient basis for exercising jurisdiction over all defendants in their individual and official capacities.

REASONS FOR ALLOWANCE OF THE WRIT

I. INTRODUCTION

The Kansas City, Missouri Board of Police Commissioners is created by State statute to organize and operate the Department. Mo. Rev. Stat. §§ 84.350, *et seq.* The Department is funded by the City of Kansas City, Missouri. Mo. Rev. Stat. § 84.730. However, the Department is an agency of the State of Missouri and its members are agents of the State and of the City. *State ex rel. Spink v. Kemp*, 283 S.W.2d 502, 365 Mo. 368 (1955); Mo. Rev. Stat.

§ 84.710. The Tenth Circuit's decision failed to take these facts into account.

The discreet contacts on which the court of appeals focused are too attenuated and remote to provide a basis for jurisdiction consistent with the fundamental notions of fair play and substantial justice the due process clause was designed to protect, even if defendants were private citizens. Where defendants are state law enforcement officers who are sued for allegedly breaching duties they have only as a result of their positions as state agents, basing jurisdiction on such isolated contacts is even more clearly a violation of due process. Further, the issue of whether a cause of action arises out of a state agent's contact with another State must be viewed in the context of the source of duties allegedly breached and the nexus between the jurisdictional contacts, the authority of the state agent to act within the forum State, and the extent to which the action is based upon an alleged deficiency in the exercise of official authority. The court of appeals failed to do so. Thus, not only does the Tenth Circuit's opinion conflict with applicable decisions of this Court, it also raises important questions of federal law not previously decided by the Court concerning the extent to which state agents and agencies can be treated in the same manner as private citizens in exercising long-arm personal jurisdiction.

II. IT IS UNREASONABLE TO EXERCISE LONG-ARM PERSONAL JURISDICTION OVER STATE AGENTS AND AGENCIES BASED UPON THE DISCREET ISOLATED CONTACTS DEFENDANTS HAD WITH KANSAS.

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court held that the State of California could constitutionally

entertain an action against the State of Nevada, the University of Nevada, and the estate of a deceased employee of the University, without affording defendants the sovereign immunity to which they would have been entitled in a Nevada court. The case involved a traffic accident that occurred on a California highway. In explaining its holding, the majority stated:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.

Id. at 424 n.24. Mr. Justice Blackmun, in a dissenting opinion joined by then Chief Justice Burger and Associate Justice Rehnquist, worried that this footnote gave too little assurance that, "if California had adopted some other policy in some other area of law, the result would be any different", and decried the prospect that:

> The Court's expansive logic and broad holding – that so far as the Constitution is concerned, State A can be sued in State B on the same terms any other litigant can be sued – will place severe strains on our system of cooperative federalism.

Id. at 429 (Blackmun, J., dissenting).

Here, the action does not involve a traffic accident or other occurrence for which state agents or agencies might be held liable under the same circumstances as a private citizen. Rather, it involves allegations that defendants

breached duties alleged to have arisen out of the discharge of their sovereign responsibilities. Permitting the exercise of long-arm jurisdiction under these circumstances, at least based on the isolated contacts at issue here, will interfere significantly with the States' capacity to fulfill those responsibilities.

That defendants are Missouri law enforcement officers provides the only basis for plaintiffs' assertions that they were required to secure the arrest of Moore, that they were required to protect plaintiffs' safety, or that it was wrongful for them to have advised Moore of the issuance of a warrant for his arrest. Exercising jurisdiction under those circumstances "may force radical changes in the way States do business with one another", and may impose "financial and administrative burdens on the States themselves." *Id.* at 430. Moreover, it presents the prospect that law enforcement agencies will alter the method by which they provide services to crime victims who live in other States and by which they pursue investigations of criminals who do not remain within the jurisdiction. If conducting investigative activities out of State bears with it the possibility that law enforcement agents and agencies will be subjected to suit in a foreign jurisdiction for perceived deficiencies in the manner in which they perform their law enforcement responsibilities, agencies will be motivated toward restricting their investigative activities within state lines in order to avoid uncertainties as to whether a foreign jurisdiction must, as a matter of constitutional law, or would, as a matter of comity, afford the law enforcement agency the same protections of sovereign immunity, official immunity, and the public duty doctrine available in its own courts. As a

matter of due process, litigation with such potentially drastic consequences must not be permitted to proceed where defendants' only presence within the forum State occurs two weeks before plaintiffs are injured by the actions of the third party and that contact is, at best, remotely related to such injuries.

In order for a court constitutionally to exercise jurisdiction over a defendant who has been served with process outside of the State, the defendant must be shown to have had sufficient "minimum contacts" with the forum State, such that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This requirement serves two functions:

> It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). In light of that second function, an analysis of the constitutionality of long-arm jurisdiction necessarily involves a balancing of the respective interests of the forum State and the interstate system, and the defendants' right to be protected from suit in a foreign State, unless the exercise of jurisdiction, is, in light of the defendants' conduct, fair and reasonable. *Id.* Where defendants are state agents or state agencies, that factor itself must be weighed in the balance in order to preserve the concepts of federalism on which state sovereignty is based. No defendant is subject to long-arm jurisdiction unless

his "conduct and connection with the forum State is such that he should reasonably anticipate being haled into court there." *Id.* at 297. The framers of the Constitution especially "reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). Therefore, when long-arm jurisdiction is asserted over state agents or state agencies, special scrutiny is required to determine that a sufficient nexus exists between the defendants' conduct, the cause of action, and the forum State.

In *Nevada v. Hall*, the Court had difficulty defining the constitutional basis for a restriction on the authority of one State's courts to entertain suits against another State. The majority began by noting the importance of the question and concluding that it was "not expressly answered by any provision of the Constitution". *Hall*, 440 U.S. at 414. Mr. Justice Blackmun concluded that the guarantee of state sovereign immunity "is implied as an essential component of federalism." *Id.* at 430 (Blackmun, J., dissenting). Then Associate Justice Rehnquist found the restriction through the combined import of Article III and the Eleventh Amendment. However, the majority devoted most of its attention to determining whether the Full Faith and Credit clause required a State to respect the sovereign immunity of its sister State and concluded that it did not, if to do so would contradict the forum State's public policy. Where jurisdiction is asserted over the persons of state agents or agencies through long-arm service, there is no difficulty in determining which constitutional provision restricts the authority of the forum State.

Since *Pennoyer v. Neff*, 95 U.S. 714 (1878), it has been clear that the due process clause of the Fourteenth

Amendment restricts the ability of a State to exercise long-arm jurisdiction over non-residents. Where the non-resident defendants are state agents or agencies, concepts of fundamental fairness and reasonableness require close attention to the issue of whether the defendants' activity within the forum is sufficiently purposeful and pervasive to justify forcing them to respond in derogation of the defendant State's status as a coequal sovereign of the forum State. Where, as here, the basis of the suit is an alleged failure to discharge sovereign responsibilities, the due process clause should be held to prohibit the exercise of jurisdiction on the basis of the discreet, isolated, attenuated contact these defendants had with the State of Kansas. Therefore, this Court should review the Tenth Circuit decision in order to confirm that "[a]s far as the Constitution is concerned, a State should not be equated with any private litigant." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

III. DEFENDANTS DID NOT PURPOSEFULLY AVAIL THEMSELVES OF THE PRIVILEGE OF CONDUCTING BUSINESS IN KANSAS THROUGH ISOLATED CONTACTS INCIDENTAL TO THEIR INVESTIGATION.

In determining whether a non-resident defendant's contacts with the forum State are such that it would be fair and reasonable to exercise long-arm jurisdiction, the critical issue is whether "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235,

253 (1958). Where defendants are state agents and state agencies, that fact requires a court that considers the "purposeful availment" issue to compare the nature of the conduct that plaintiff alleges gives rise to jurisdictional contacts, with the underlying theory of the cause of action.

The Nevada employee sued in *Hall* purposefully availed himself of the privilege of conducting business in California when he operated his car on California highways. In doing so, he invoked the protections of California's traffic safety laws and would have been free to sue in a California court if another motorist had negligently injured him. Thus, it was reasonable for a California court to exercise jurisdiction in an action based on allegations that the Nevada employee breached the same duties imposed upon every other motorist.

Here, defendant Phelan did not seek the benefits and protections of Kansas laws. Rather, she attempted to make the protections of Missouri law available to plaintiffs as Kansas citizens. If the action against her was based upon alleged conduct for which a private citizen would be held liable, it might be reasonable to conclude that, in allegedly assuring plaintiffs of their safety, she had purposefully availed herself of the privilege of conducting business within Kansas. But this is not a fraud action. Defendant Phelan has been sued because she allegedly failed to protect plaintiffs from Moore. To the extent that she had a duty to provide any such protection, it existed only by virtue of her authority to enforce Missouri law. Thus, it would be neither fair nor reasonable to require defendant Phelan to respond in Kansas to allegations that she failed to discharge her duties as a Missouri

law enforcement officer on the basis of the statement she allegedly made while at the Taylors' home.

Similarly, Detective Wessler, when he called Moore, in no manner invoked the benefits and protections of Kansas law. He too was attempting to provide plaintiffs with the protection of Missouri law, in what he determined to be the most expeditious manner practical. Plaintiffs contend that Detective Wessler's conduct was wrongful, not because any citizen should be held liable for advising a suspect of the issuance of a warrant, but rather because his call constituted an alleged breach of police procedure. Therefore, the call can in no sense be regarded as purposeful availment of the privilege of conducting business within Kansas.

The Tenth Circuit's decision does not take into account the governmental nature of the duties defendants are alleged to have breached in determining whether they purposefully availed themselves of the privilege of conducting business within the State of Kansas. Reviewing that decision will provide this Court with an opportunity to clarify that such an analysis is required.

IV. PLAINTIFFS' ACTION DOES NOT ARISE OUT OF THE CONTACTS WITH KANSAS ON WHICH THE TENTH CIRCUIT FOCUSED.

The due process clause restricts the exercise of long-arm jurisdiction to actions that arise out of contacts made between defendant and the forum State. *Burnham v. Superior Court of California*, 495 U.S. ___, 109 L Ed 2d 631, 639 (1990). Plaintiffs' basic theory is that defendants failed to arrest Moore before he attacked them. Such an action

against state agents and agencies cannot be seen to have arisen out of incidental contacts defendants have with the forum State in the course of their efforts to effect the arrest.

The essential allegations of wrongful conduct by defendants are set forth in Paragraphs 21 and 22 of the Petition. Paragraph 21 alleges:

> Despite the pleas of the plaintiffs, no arrest was made nor was a warrant issued and processed in time for the arrest of Michael Moore before he had assaulted plaintiffs. . . .

Paragraph 22 alleges:

> [D]efendants individually knew or should have known of the actions that allowed Michael Moore to remain free without restraint or restriction, and the defendants knew or should have known of the issuance and maintenance of improper policies or the failure of others to obey proper policies, that allowed Michael Moore to remain free and caused injury and damage to plaintiffs.

Thus, prior to the time that defendants filed a motion seeking dismissal of the action on jurisdictional grounds, plaintiffs described their action as follows:

> This lawsuit involves the failure to timely issue and execute upon a complaint of sodomy and assault which occurred in that part of Kansas City, Missouri which lies in Clay County, Missouri.

Memorandum in Support of Motion for Order Requiring Production of Clerk of Circuit Court, Doc. No. 17, ¶ 1.

Defendant Phelan's alleged assurance to plaintiffs and Detective Wessler's phone call to Moore are at best

tangential to the cause of action plaintiffs allege. The Petition does not allege that defendant Phelan was wrong to assure plaintiffs of their safety or that the assurance caused their injuries. It makes no mention of Detective Wessler's phone call and does not join Wessler as a defendant. While such incidental contacts may provide an adequate basis for haling private citizens into the courts of another State, they are insufficient to justify the exercise of long-arm jurisdiction over state agents and state agencies who are sued for alleged deficiencies in the fulfillment of their governmental functions.

Where a State is sued for conduct that is engaged in entirely within a sister State, the exercise of long-arm jurisdiction can be supported as fair and reasonable. *Nevada v. Hall* provides an example of such a case. But state defendants' incidental conduct within the forum State cannot serve as a basis to require them to respond for a whole range of alleged acts and omissions that occur within the defendant State's borders and that are alleged to be wrongful only because of the defendants' capacities as state agents or state agencies.

A State that acts within its own state lines to fulfill its sovereign responsibilities must be assured that it can be sued only in its own courts for injuries allegedly resulting from any deficiencies in the manner in which it has done so and that it will, therefore, retain the protection of sovereign immunity, official immunity, and the public duty doctrine upon which its obligation to discharge those responsibilities has been structured. Requiring these defendants to defend in Kansas an action based upon alleged failure to provide police protection, to secure an arrest warrant, and to make an arrest deprives

them of that assurance. The Court should review the Tenth Circuit's decision in order to demonstrate that such a deprivation violates due process, where defendants' only contacts with the forum State are incidental to the provision of governmental services.

V. THERE IS NO JURISDICTION OVER THE MEMBERS OF THE BOARD OF POLICE COMMISSIONERS IN THEIR INDIVIDUAL CAPACITIES.

Plaintiffs have sued the members of the Board of Police Commissioners in their individual, as well as in their official capacities. Plaintiffs do not assert that these individuals had any contact with Kansas. However, the Tenth Circuit held that jurisdiction could be exercised on the basis of the conduct of defendant Phelan and Detective Wessler. That decision is erroneous.

The actions of law enforcement officers provide a jurisdictional basis over those who operate the law enforcement agency, in their individual capacities, only if "the agents represented the defendants in their individual, as contrasted with their official, capacities." *Green v. McCall*, 710 F.2d 29, 33 (2nd Cir. 1983). The agents represent the officials only if the officials stand to benefit in their individual capacity from the law enforcement actions of the officers. *Marsh v. Kitchen*, 480 F.2d 1270, 1273 (2nd Cir. 1973). There has not been and could not be any contention that the actions of defendant Phelan and Detective Wessler benefited the members of the Board in their individual capacities. Therefore, the Tenth Circuit's decision is in conflict with the decisions of the Second

Circuit in *Green* and *Marsh*. The Court should review the Tenth Circuit's decision to resolve the conflict.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL TAYLOR and BRENDA TAYLOR, in their own right and as parents and natural guardians of MICHAEL ANDREW TAYLOR, a minor, and as the surviving mother and father and surviving heirs at law and co-administrators of the Estate of JESSICA TAYLOR, deceased,

Plaintiffs-Appellants,

v.

PAULA PHELAN, an individual and a member of the Kansas City, Missouri Police Department; RICHARD BERKELY, ARTHUR D. BROOKFIELD, II, BEVERLEY BARKER NICKS, JOHN L. WILLIAMS, MICHAEL B. MEADE, and LARRY JOINER, as individuals and as Members constituting THE KANSAS CITY, BOARD OF POLICE COMMISSIONERS,

Defendants-Appellees.

No. 89-3012

FILED
AUG 27 1990

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 88-2150-0)

Robert B Van Cleave (Frank D. Menghini and Jeanne Gorman Rau with him on the brief) of McAnany, Van Cleave & Phillips, P.A., Kansas City, Kansas, for Plaintiffs-Appellants.

J. Emmett Logan of Morrison, Hecker, Curtis, Kuder, & Parrish, Overland Park, Kansas, for Defendants-Appellees.

Before McKAY and BARRETT, Circuit Judges, and KANE,* District Judge.

PER CURIAM.

This appeal is from a grant of summary judgment in favor of defendants, Ms. Paula Phelan, a detective of the Kansas City, Missouri, Police Department (Detective Phelan), and the Kansas City, Missouri, Board of Police Commissioners, as a Board and as individuals (Board), on the ground that the United States District Court for the District of Kansas did not have personal jurisdiction over the Missouri defendants. Plaintiffs argue on appeal that there were sufficient contacts between the defendants and the State of Kansas to support personal jurisdiction consistent with the dictates of due process. Because we hold that the plaintiffs have made the requisite prima facie showing necessary to establish personal jurisdiction, we reverse.

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*Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

The facts we recite here are either agreed to by the parties or contained in evidence properly presented by the losing party in response to the motion for summary judgment. The latter are taken as true only for purposes of determining whether summary judgment should have been granted. On or about September 25, 1986, plaintiffs Michael and Brenda Taylor became aware that an individual named Michael Moore had sexually assaulted their daughter, Jessica Taylor. The assault had taken place in Kansas City, Missouri. After learning of the assault, the Taylors reported the incident to the appropriate law enforcement agency, the Kansas City, Missouri, Police Department.

The case was assigned to Detective Phelan, a member of the Sex Crimes Unit. During the course of the investigation, there were repeated telephone contacts between the Taylors in Kansas and Detective Phelan and other members of the Police Department in Missouri. As a result of interviews with Jessica and her parents, the police eventually determined that there was probable cause to issue a warrant for the arrest of Michael Moore.

On or about October 31, 1986, Detective Phelan, accompanied by Detective Wessler, who is not named in this suit, came to the Taylors' home in Kansas City, Kansas. During the visit, Detective Phelan assured Mrs. Taylor that everything was being done to investigate the matter and that the warrant would be issued for Moore's arrest. Detective Phelan also assured Mrs. Taylor that her family would be safe from harm. Mrs. Taylor has stated in an affidavit that, based on this assurance, neither she nor her husband took any precautionary measures for their safety or that of their children.

On November 7, 1986, Detective Wessler telephoned Michael Moore at Moore's Kansas home and informed him that a warrant had been issued for his arrest. Moore told Wessler that he would voluntarily surrender the next day, which he failed to do. There was no further contact between Detective Wessler or any other member of the police department and Moore. During the night of November 12, 1986, Moore broke into the Taylor's house, shot Michael Taylor in the head, injured Brenda Taylor, poured gasoline on Michael A. Taylor and his sister, Jessica, setting them afire, killing Jessica and severely injuring Michael A. Taylor. After his rampage, Taylor [sic] committed suicide. He left behind a note in which he said "[i]f I'm going to get blamed for something, I want to make sure I did it."

The Taylors brought this personal injury, wrongful death and damage action against Detective Phelan, individually, and as a member of the Kansas City, Missouri, Police Department, and against the Board and its members individually, basing their federal claims on 42 U.S.C. § 1983 and the state claims under the Kansas Tort Claims Act with jurisdiction based on diversity.[1] Upon defendants' motion for judgment on the pleadings, the district court dismissed the claims for lack of personal jurisdiction over the defendants. (October Order).[2]

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[1] The case was originally filed in the District Court of Wyandotte County, Kansas, but was later removed by defendants to the United States District Court for the District of Kansas.

[2] Because the parties had presented matters outside the pleadings which were considered by the court, the court

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This court reviews a district court's ruling on a jurisdictional question de novo. *Ten Mile Indus. Park v. Western Plains Serv. Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987). In conducting this review, we are guided by the following standard:

> [t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Behagen v. Amateur Basketball Ass'n, 744 F.2d 731, 733 (10th Cir. 1984) (citations omitted), *cert. denied* 471 U.S. 1010 (1985). Our task thus becomes to determine from the

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treated the defendants' motion as one for summary judgment, pursuant to Fed. R. Civ. P. 12(c). The Taylors claim that it was error for the district court to convert defendants' motion from one for judgment on the pleadings to one for summary judgment without informing them and allowing them time to complete the initial phases of discovery. We do not resolve this issue because, even if the conversion were erroneous, such error was harmless since the trial court granted the Taylors' motion for reconsideration and reexamined the record in light of all of the newly available evidence. After this reconsideration the court, on December 16, 1988, entered another order reaffirming its earlier findings (December Order).

parties' affidavits and other written materials whether the plaintiffs have established a prima facie case of minimum contacts with the forum state by each defendant sufficient to justify jurisdiction. *Rambo v. American S. Ins. Co.*, 839 F.2d 1415, 1417 (10th Cir. 1988).

Whether a federal court has personal jurisdiction over a nonresident defendant in a diversity action is determined by the law of the forum state. *Yarbrough v. Elmer Bunker & Assocs.*, 669 F.2d 614, 616 (10th Cir. 1982); *see also* Fed. R. Civ. P. 4(e). The district court in a diversity action may not exercise personal jurisdiction unless it complies with both the forum state's long-arm statute and the Constitution. *Equifax Servs., Inc. v. Hitz*, 1990 WL 72646 at 12 (10th Cir. June 4, 1990).[3] A two-step analysis is therefore required: first, does the defendant's conduct fall within the scope of the relevant section of the long-arm statute; and second, does the exercise of personal jurisdiction comport with the requirements of due process? *Volt Delta Resources, Inc. v. Devine*, 740 P.2d 1089, 1093 (Kan. 1987).

Application of the Kansas long-arm statute

Defendants argue that the Kansas long-arm statute does not apply to their activities. In finding otherwise, the district court relied on *Ling v. Jan's Liquors*, 703 P.2d

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[3] The Kansas long-arm statute, Kan. Stat. Ann. § 60-308(b) (1983 & Supp. 1989), is liberally construed to allow the exercise of personal jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the fourteenth amendment. Volt Delta Resources, Inc. v. Devine, 740 P.2d 1089, 1092 (Kan. 1987).

731 (Kan. 1985). In *Ling* the Kansas Supreme Court upheld Kansas jurisdiction over a Missouri liquor vendor who had sold liquor to a minor. The intoxicated minor drove into Kansas and caused injury to the plaintiff in Kansas. The court held that "it is possible to bring suit in Kansas to recover damages for injuries occurring in this state which resulted from negligent conduct outside the state," concluding that an injury which occurs in Kansas as a result of a tortious act outside the state amounts to a "tortious act within the state," thus falling within subsection (2) of the long-arm statute. *Id.* at 734. *See* Kan. Stat. Ann. § 60-308(b)(2) (1983 & Supp. 1989).

The district court here, noting that Kansas interprets the term "tortious act" broadly, concluded that defendants' alleged negligence in Missouri resulted in plaintiffs' injuries in Kansas, thus bringing defendants' acts "squarely within the Kansas long-arm statute." October Order at 7. Because there is no indication of any retreat under Kansas law from the broad reading of the tortious act section of the state long-arm statute as put forth in *Ling, see Volt Delta Resources,* 740 P.2d at 1092; *Ray v. Heilman,* 660 F. Supp. 122, 123-24 (D. Kan. 1987) (applying Kansas law), we conclude that the district court was correct in determining that the Kansas long-arm statute applies to the defendants' actions.

Constitutional requirements

Since we have concluded that service of process over the defendants is appropriate under the state's long-arm statute, we must now determine whether the exercise of

such jurisdiction satisfies the requirements of due process. In finding that it does not, the district court relied on a test formulated by the Ninth Circuit in *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977), and first cited by this court in *Rambo v. American Southern Insurance Co.*, 839 F.2d 1415 (10th Cir. 1988). As the *Rambo* court noted, the test is one for specific jurisdiction and provides that:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
>
> (2) The claim must be one which arises out of or results from the defendant's forum-related activities.
>
> (3) Exercise of jurisdiction must be reasonable.

Id. at 1419 n.6 (quoting *Data Disc*, 557 F.2d at 1287).

After applying this test, the district court concluded that the Taylors had failed to demonstrate that their claims arose out of or resulted from the defendants' forum related activities as required by the second prong of *Data Disc*. October Order at 9. In arriving at this result, the court focused on the role of the assailant, Michael Moore, and concluded that " 'unilateral activity of . . . a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State.' " *Id.* at 9 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)). The district court found that "[d]efendant's investigation activities in Kansas, including defendant

Phelan's visit to plaintiffs' home, did not give rise to plaintiffs' injuries. Instead, plaintiffs' injuries were the result of Michael Moore's actions." October Order at 9. *See also* December Order at 6.

The error in this analysis lies in its assumption that the Taylors are relying on Moore's activities in Kansas as the basis for their claim against these Missouri defendants and for asserting jurisdiction over them in Kansas. It is clear that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Nor is the unilateral activity of a third person an appropriate consideration when determining whether a defendant's contacts with a particular state are sufficient to justify the assertion of personal jurisdiction. *Helicopteros Nacionales*, 466 U.S. at 417. The Taylors here, however, are not attempting to base jurisdiction on what Moore did to them in Kansas; they point to independent acts, performed by these defendants in Kansas, and allege that those acts ultimately led or contributed to their injury at Moore's hands.

In order to survive the defendants' motion to dismiss for lack of personal jurisdiction, the Taylors need only make a prima facie showing that their claims "arise out of" or "result from" the defendants' acts in Kansas. *See Behagen*, 744 F.2d at 733. In their complaint the Taylors allege that the defendants' negligence proximately resulted in the death of their daughter and the injury and damage to them. Complaint at 8. The Taylors, of course, do not allege that the defendants shot them and burned their children, but rather they claim that less dramatic,

but nonetheless real, acts of negligence occurred in Kansas which ultimately led to their harm. In particular, the Taylors assert that Detective Phelan assured them, while she was in their home in Kansas, that they would be safe from physical assault and harm. Complaint at 5. Mrs. Taylor has testified in an affidavit that because of this assurance, neither she nor her husband took any extraordinary precautions to protect themselves or their children from Michael Moore. The forum-related contact was the assurance; the result of this contact was the Taylors' failure to protect themselves from Michael Moore in reliance on this assurance. This claim certainly "arises out of" and "results from" Detective Phelan's Kansas contacts, and we find, therefore, that personal jurisdiction over Detective Phelan can be exercised consistent with the dictates of due process.

Our view that jurisdiction over the Board is also appropriate rests on a different analytical footing and stems from activities in Kansas by both Detective Phelan and Detective Wessler. Both detectives journeyed to Kansas and had contacts with Kansas pursuant to their jobs as employees of the Board. Detective Wessler also made a telephone call to the suspect in Kansas, informing him that a warrant for his arrest had been issued even though Detective Wessler did not then have the present ability to take Moore into custody.[4] The Taylors submitted testimony from an expert in police training and procedure that this action "constituted a serious breach of police

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[4] So long as it creates a substantial connection, even a single telephone call into the forum state can support jurisdiction. *Rambo*, 839 F.2d at 1418.

procedure and by that act alone placed the victim [sic] in peril, a fact which should have been known to a reasonable police officer." Exhibit 3 to Doc. 78.

There is nothing in the briefs or the record to indicate that the actions taken by the detectives were not within the scope of their employment. Under the theory of respondeat superior, a principal is liable for the acts of an agent when those acts are committed in the course of or within the scope of the agents employment. *Beggerly v. Walker,* 194 Kan. 61, 397 P.2d 395, 399 (1964); *see also Hamilton v. Neff,* 189 Kan. 637, 371 P.2d 157, 160 (1962). Following that theory, it is well-established that a principal may be subject to the jurisdiction of the court because of the activities of its agent within the forum state. *Wells Fargo & Co. v. Wells Fargo Express Co.,* 556 F.2d 406, 419 (9th Cir. 1977); *Davis v. Asano Bussan Co.,* 212 F.2d 558, 563 (5th Cir. 1954); *Daughtry v. Arlington County,* 490 F. Supp. 307, 313 (D.D.C. 1980); *see also Burchett v. Bardahl Oil Co.,* 470 F.2d 793, 797 (10th Cir. 1972).[5] Accordingly, we hold

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[5] While we recognize that the principle of respondeat superior will not apply to implicate the Board in the Taylors' claims under 42 U.S.C. § 1983, *see* Meade v. Grubbs, 841 F.2d 1512, 1531 (10th Cir. 1988) (citing Monell v. Dep't of Social Servs., 436 U.S. 658, 691 (1978)), the Taylors also bring claims under the Kansas Tort Claims Act, Kan. Stat. Ann. §§ 75-6101 through 6119, (1989). In contrast to section 1983, the Kansas Tort Claims Act provides that a governmental entity shall be liable for damages caused by the negligent or wrongful act or omission "of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of the state." *Id* at § 75-6103(a). Thus, under the proper

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that the district court in Kansas can constitutionally exercise jurisdiction over the Board based on the acts of its agents.

In holding the Missouri defendants' contacts in Kansas sufficient to establish the Kansas federal court's jurisdiction over them for purposes of this action, we recognize that considerable factual questions still remain as to any causal connection between their alleged negligence and the harm ultimately inflicted on the Taylors by Moore. In particular, the role of Moore's actions as an intervening cause in this chain of events needs to be evaluated. These questions, however, concern the foreseeability and probability of the Taylors being harmed as a result of defendants' actions, *see* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 313 (5th ed. 1984) ("It is only where misconduct [such as that of Moore here] was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed."), and not whether the Taylors' claim against defendants, valid or not, arose out of or resulted from sufficient forum contacts to permit the exercise of jurisdiction without constitutional impediment. These issues are, moreover, quintessential factual issues more properly addressed to the trier of fact for a decision on the merits. Thus, while Moore's actions may ultimately be found to have been an intervening cause which broke the

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circumstances, the Board may be held liable for actions of its agent, Detective Phelan, as well as for the actions of its agent, Detective Wessler, even thought the latter is not a named defendant in this suit.

causal connection to these defendants, this possibility does not prevent jurisdiction from being asserted against the Missouri defendants for a claim arising out of or resulting from defendants' Kansas contacts.

We hold, therefore, that jurisdiction over Detective Phelan in Kansas is not violative of due process standards and, that as the employer of both Detective Phelan and Detective Wessler, the Board is subject to jurisdiction in Kansas for the torts allegedly committed in that state by its agents. The order of the district court for the district of Kansas is REVERSED, and this case is REMANDED for proceedings consistent with this opinion.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL TAYLOR and BRENDA TAYLOR, in their own right and as parents and natural guardians of MICHAEL ANDREW TAYLOR, a minor, and as the surviving mother and father and surviving heirs at law and co-administrators of the Estate of JESSICA TAYLOR, deceased,	)	No. 89-3012
Plaintiffs-Appellants,	)	
v.	)	
PAULA PHELAN, an individual and a member of the Kansas City, Missouri Police Department, RICHARD BERKELY, ARTHUR D. BROOKFIELD, II, BEVERLEY BARKER NICKS, JOHN L. WILLIAMS, MICHAEL B. MEADE, and LARRY JOINER, as individuals and as Members constituting THE KANSAS CITY, MISSOURI BOARD OF POLICE COMMISSIONERS,	)	
Defendants-Appellees.	)	

ORDER
Filed October 12, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK,

BRORBY, EBEL, Circuit Judges, and KANE*, District Judge.

This matter comes on for consideration of appellees' suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

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*The Honorable John L. Kane, Senior District Judge, of the United States District Court for the District of Colorado, sitting by designation.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MICHAEL TAYLOR and BRENDA TAYLOR, in their own right and as parents and natural guardians of MICHAEL ANDREW TAYLOR, a minor, and as the surviving mother and father and surviving heirs at law and co-administrators of the Estate of JESSICA TAYLOR, deceased,	)	CIVIL ACTION No. 88-2150-O
Plaintiffs,	)	
v.	)	
PAULA PHELAN, an individual and a member of the Kansas City, Missouri Police Department; RICHARD BERKELEY, ARTHUR D. BROOKFIELD, II, BEVERLEY BARKER NICKS, JOHN L. WILLIAMS, MICHAEL B. MEADE, and LARRY JOINER, as individuals and as Members constituting THE KANSAS CITY, MISSOURI BOARD OF POLICE COMMISSIONERS,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the court on plaintiffs' motion to strike certain defenses and defendants' motion for judgment on the pleadings. Because the defendants' motion is dispositive, plaintiffs' motion will not be addressed. Additionally, because the parties presented and the court considered matters outside the pleadings, defendants'

motion will be treated as one for summary judgment. Fed. R. Civ. P. 12(c).

In considering the defendants' motion for summary judgment, the court must examine all the evidence in the light most favorable to the plaintiffs. *Barber v. General Elec. Co.*, 648 F.2d 1272, 1276 n.1 (10th Cir. 1981). According to the federal rules, summary judgment is proper only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under this rule, the initial burden is on the moving party to show the court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party's burden may be met when that party identifies those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323.

Once the moving party has met these requirements, the burden shifts to the party resisting the motion. The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The party resisting the motion "may not rest upon the mere allegations or denials of his pleadings . . . " to avoid summary judgment. *Anderson*, 477 U.S. at 248 The mere existence of a scintilla of evidence will not avoid summary judgment; there must be sufficient evidence on which a jury could reasonably find for the nonmoving party. *Id.* at 251 (quoting *Improvement Company v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1872)).

For the purposes of this motion, the uncontroverted facts are as follows. On or about September 25, 1986, plaintiffs Michael and Brenda Taylor became aware that an individual by the name of Michael Moore had assaulted and sexually molested their daughter, Jessica Taylor. The incident occurred in Kansas City, Missouri, some eleven months before the plaintiffs became aware of it. After numerous examinations by medical doctors and consultations with social workers, plaintiffs decided to report the incident to the appropriate law enforcement agency, which was the Kansas City, Missouri Police Department.

On or about October 21, 1986, plaintiffs contacted the Kansas City, Missouri Police Department. The case was assigned to Detective Paula Phelan in the Sex Crimes Unit. Plaintiffs filed a report with Detective Phelan on or about October 22, 1986. Detective Phelan interviewed plaintiffs and Jessica Taylor; the interview with Jessica was video taped. As a result of the interviews, defendants Phelan and the Kansas City, Missouri Police Department had sufficient probable cause to issue a warrant for the arrest of Michael Moore, Jessica's alleged assailant and molester. From the time of their report forward, plaintiffs made repeated contacts by telephone and in person with defendant Phelan and other members of the Kansas City, Missouri Police Department to express their concerns about Michael Moore and to inquire about his arrest.

Michael Moore learned of plaintiffs' complaint to the police and, as a result, confronted and harassed plaintiffs. Plaintiffs informed defendant Phelan and other members of the Kansas City, Missouri Police Department of Moore's confrontations and harassments. On or about

October 24, 1986, Michael Moore voluntarily presented himself to the Kansas City, Missouri Police Department for questioning. Moore was released without restriction, pending a lie detector test. Moore never appeared for the lie detector test, and defendants never apprehended or restrained him in any way.

On or about October 31, 1986, defendant Phelan came to plaintiffs' house at 3032 North 54th Street, Kansas City, Kansas, to further interview plaintiffs and to obtain another medical report. Detective Phelan assured the plaintiffs that everything was being done to investigate the matter, that a warrant for Michael Moore would be issued, and that plaintiffs would be safe from harm.

On November 12, 1986, Michael Moore broke into plaintiffs' home at 3032 North 54th Street, Kansas City, Kansas. Moore shot plaintiff Michael Taylor, injured plaintiff Brenda Taylor as she tried to escape, poured gasoline on plaintiff Michael Andrew Taylor and on Jessica Taylor and set them afire. Jessica Taylor died from her injuries, and plaintiff Michael Andrew Taylor suffered severe, painful and disfiguring burns. Michael Moore thereafter committed suicide.

During the relevant time period, plaintiffs lived in Kansas City, Kansas. Michael Moore also lived and worked in Kansas City, Kansas. The investigation of Moore's alleged assault of Jessica Taylor took place in Kansas City, Kansas, and Kansas City, Missouri.

Plaintiffs instituted this suit against the following defendants: (1) Detective Paula Phelan, as an individual and as a member of the Kansas City, Missouri Police Department; (2) Richard Berkeley, Arthur D. Brookfield,

II, Beverley Barker Nicks, John L. Williams, Michael B. Meade, and Larry Joiner, as individuals and as members of the Kansas City, Missouri Board of Police Commissioners; and (3) the Kansas City, Missouri Board of Police Commissioners. Plaintiffs claim that defendants violated plaintiffs' civil rights, specifically 42 U.S.C. § 1983, and that defendants' negligence caused plaintiffs' injuries and Jessica Taylor's death. Essentially, plaintiffs claim that defendants were negligent in failing to arrest Michael Moore and in issuing and maintaining improper policies regarding the investigation of crimes and the execution of arrest warrants.

Defendants move the court for summary judgment, claiming that this court lacks personal jurisdiction over them. In evaluating defendants' claim, several well-established principles must be followed. As the Tenth Circuit explained:

> The plaintiff bears the burden of establishing personal jurisdiction over the defendant. . . . Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. . . . The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. . . . If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party. . . .

Behagen v. Amateur Basketball Ass'n., 744 F.2d 731, 733 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010 (1985) (citations omitted). In the present case, the court has accepted

plaintiffs' stated facts; nevertheless, plaintiffs have failed to establish a prima facie showing that the court has personal jurisdiction over the defendants.

A two-step analysis is necessary to determine if this court has personal jurisdiction over the defendants. The court must first determine whether it has jurisdiction under the Kansas long-arm statute, K.S.A. 60-308(b). If long-arm jurisdiction is established, the court must then decide if the exercise of personal jurisdiction would violate the constitutional guarantee of due process. *Hall v. National Basketball Ass'n*, 651 F.Supp. 335, 337 (D. Kan. 1987).

Turning to the first step of the analysis, the court must determine if the Kansas long-arm statute is applicable in this case to extend service of process over the nonresident defendants. The Kansas long-arm statute provides in part:

> Any person, whether or not a citizen or a resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person . . . to the jurisdictions of the courts of this state as to any cause of action arising from the doing of any of these acts: . . .
>
> (2) commission of a tortious act within this state. . . .

K.S.A. 1987 Supp. 60-308(b). The long-arm statute is liberally construed to the limits of due process. *Carrothers Construction Co. v. Quality Service & Supply, Inc.*, 586 F.Supp. 134, 136 (D. Kan. 1984).

The court has determined that the Kansas long-arm statute applies to defendants' alleged negligence. In *Ling*

v. Jan's Liquors, 237 Kan. 629, 703 P.2d 731 (1985), the Kansas Supreme Court broadly interpreted the term "tortious act" to imply a whole continuum of actions rather than a single act. Under the Kansas court's interpretation, the tortious act is not complete until the injury has occurred; therefore, the act is deemed to have occurred in the state where the injury occurs. *See Ray v. Heilman*, 660 F.Supp. 122, 124 (D. Kan. 1987) (discussing *Ling*). Accordingly, the Kansas Supreme Court held that "under the provisions of K.S A. 60-308(b)(2), it is possible to bring suit in Kansas to recover damage for injuries occurring in this state which resulted from negligent conduct outside the state." *Ling*, 237 Kan. at 633, 703 P.2d at 734. The parties do not dispute that defendants' alleged negligence occurred in Missouri, while the plaintiffs' injuries occurred in Kansas. The defendants' alleged negligence therefore resulted in the commission of a tortious act within Kansas, bringing defendants' conduct squarely within the Kansas long-arm statute. Although the defendants urge the court to limit *Ling* to its facts, the Kansas Supreme Court has applied *Ling* to different factual situations and has not given any indication that the *Ling* holding should be narrowly interpreted. *See, e.g., Head v. Platte County, Mo.*, 242 Kan. 442, 447, 749 P.2d 6, 9 (1988); *Volt Delta Resources, Inc. v. Devine*, 241 Kan. 775, 778, 740 P.2d 1089, 1092 (1987). Consequently, the court finds *Ling* to be controlling and that plaintiffs have met the first step of the personal jurisdiction analysis.

The plaintiffs cannot meet the second step of the analysis, however, as the court has determined that exercising personal jurisdiction over the defendants would violate the constitutional guarantee of due process. In a

line of cases beginning with *International Shoe v. Washington*, 326 U.S. 310 (1945), the Supreme Court has attempted to define the due process limitations on a state's power to exercise in personam jurisdiction over out-of-state defendants. The basic rule that has developed is that the defendants must have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The question of whether asserting personal jurisdiction over nonresident defendants comports with due process must be answered on a case-by-case basis. *Carrothers*, 586 F.Supp. at 135. The key concern under due process is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In determining if it is fair to subject a nonresident defendant to a suit in the forum state, the court must consider the "quality and nature" of the defendant's activity. *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978). Moreover, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Supreme Court elaborated upon the "purposeful availment" requirement as follows:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attentuated" contacts, . . . or of the "unilateral activity of another party or a third person[.]"

Id. at 475 (citations omitted).

> In evaluating whether a nonresident defendant has sufficient minimum contacts with the forum to extend limited jurisdiction over the nonresident, the court uses a three-prong test, borrowed from the Ninth Circuit:
>
> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposely avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
>
> (2) The claim must be one which arises out of or results from the defendant's forum-related activities.
>
> (3) The exercise of jurisdiction must be reasonable.

Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1331 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985). Plaintiffs have failed to establish a connection between defendants' contacts with Kansas and their injuries. Therefore, plaintiffs have failed to establish the second element of limited personal jurisdiction over the defendants.

Defendants' investigation activities in Kansas, including defendant Phelan's visit to plaintiffs' home, did not give rise to plaintiffs' injuries. Instead, plaintiffs' injuries were the result of Michael Moore's actions. *See, e.g., Helicopteros*, 466 U.S. at 417 ("unilateral activity of . . . a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state"). Because the plaintiffs' cause of action is unrelated to the defendants' forum activities, the court cannot exercise personal jurisdiction over the defendants, as their activities within Kansas are

not sufficient to constitute the minimum contacts necessary under the dictates of *International Shoe* and its progeny.

The court notes that the facts of this case distinguish it from similar cases in which courts have exercised personal jurisdiction over nonresident defendants. First, the plaintiffs' claims of negligence are based on defendants' alleged omissions rather than on any affirmative acts. Second, and most importantly, the plaintiffs' cause of action does not arise from the defendants' contacts with or activities within Kansas. For example, in *Head v. Platte County, Missouri,* 242 Kan. 445, 749 P.2d 6 (1988), the Kansas Supreme Court did not question the lower court's assertion of personal jurisdiction over the nonresident defendants. The plaintiff in *Head* based her negligence claim on the affirmative act of the Platte County sheriff's department – the issuance of an arrest warrant with an incorrect physical description. Additionally, plaintiff's claims arose from the defendants' own actions, not the actions of a third party. *See also Skipper v. Prince George's County,* 637 F.Supp. 638 (D.D.C. 1986) (car chase across county line resulted in plaintiffs' injuries); *Maney v. Ratcliff,* 399 F.Supp. 760 (E.D. Wis. 1975) (actions of Louisiana police in continuously soliciting plaintiff's arrest in Wisconsin met due process requirements); *Kline v. County of St. Joseph,* LEXIS 10424 (W.D. Mich., Feb. 15, 1988) (undertaking to secure the arrest of plaintiff in another state enough to meet "purposeful availment" test).

The analogous cases which plaintiffs cite in support of the court's exercising personal jurisdiction over the defendants are similarly distinguishable. *J.E.M. Corp. v. McClellan,* 462 F.Supp. 1246 (D. Kan. 1978), concerned

intentional fraudulent misrepresentations which resulted in plaintiff's injuries, and *Ray v. Heilman*, 660 F.Supp. 122 (D. Kan. 1987), concerned a Missouri doctor's affirmative acts which caused injury to a Kansas resident. In all of the above cases, the courts were able to exercise personal jurisdiction over the defendant because the cause of action arose from the defendant's contacts with the forum. As the court previously explained, the plaintiffs' cause of action in the case at hand arises not from the defendants' conduct in Kansas, but from the conduct of an unrelated third party, Michael Moore. Thus, the cases cited above are not controlling and do not support the court's assertion of personal jurisdiction over the defendants at bar.

Because the court has found that exercising personal jurisdiction over defendants as a result of their investigation activities in Kansas would violate the constitutional guarantee of due process, defendants' motion for summary judgment will be granted and the case will be dismissed.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment (converted under Fed. R. Civ. P. 12(c) from a motion for judgment on the pleadings) is granted. The case is dismissed for lack of personal jurisdiction over the defendants.

Dated this 13th day of October, 1988, at Kansas City, Kansas.

/s/ Earl E. O'Connor
EARL E. O'CONNOR,
Chief Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MICHAEL TAYLOR and BRENDA TAYLOR, in their own right and as parents and natural guardians of MICHAEL ANDREW TAYLOR, a minor, and as the surviving mother and father and surviving heirs at law and co-administrators of the Estate of JESSICA TAYLOR, deceased, Plaintiffs, v. PAULA PHELAN, an individual and a member of the Kansas City, Missouri Police Department; RICHARD BERKLEY, ARTHUR D. BROOKFIELD, II, BEVERLEY BARKER NICKS, JOHN L. WILLIAMS, MICHAEL B. MEADE and LARRY JOINER, as individuals and as members constituting THE KANSAS CITY, MISSOURI BOARD OF POLICE COMMISSIONERS, Defendants.	CIVIL ACTION NO. 88-2150 FILED DEC 16 88

MEMORANDUM AND ORDER

This matter is currently before the court on plaintiffs' motion for new trial or to alter or amend judgment. On October 13, 1988, the court granted defendants' motion for judgment on the pleadings, which had been converted to a motion for summary judgment under Federal Rule of

Civil Procedure 12(c). The court held that plaintiffs had failed to make the required prima facie showing that the court could exercise personal jurisdiction over the defendants. Plaintiffs now move for reconsideration of the court's decision, claiming that the court erred in converting defendants' motion for judgment on the pleadings to a motion for summary judgment without notifying plaintiffs of the court's intention to so convert defendants' motion. Additionally, plaintiffs contend that they have made a prima facie showing of personal jurisdiction and offer new evidence in support. The court has determined that oral argument would not be of assistance in the resolution of plaintiffs' motion. D. Kan. Rule 206(d).

Federal Rule of Civil Procedure 12(c) mandates that motions for judgment on the pleadings be converted into motions for summary judgment if the court does not exclude the matters submitted outside the pleadings. The Rule also mandates that all parties be given a reasonable opportunity to present all material pertinent to a summary judgment motion. The "reasonable opportunity" provision of Rule 12(c) is designed to prevent unfair surprise to the parties. *Prospero Associates v. Burroughs Corp.*, 714 F.2d 1022, 1025 (10th Cir. 1983) (quoting *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393 (6th Cir. 1975)). Since it was the plaintiffs, not the defendants, who submitted matters outside the pleadings, it is curious that they now claim surprise. In plaintiffs' response to defendants' motion for judgment on the pleadings, plaintiffs attached and referred to the affidavit of plaintiff Brenda Taylor and to a summary judgment order in a Johnson County case, which order held that the court had personal jurisdiction over Missouri law

enforcement officers who issued an arrest warrant for a Kansas resident. Because plaintiffs evidently wanted the court to consider these matters, and because litigants are expected to be familiar with the Federal Rules of Civil Procedure and their application, the plaintiffs cannot be allowed to claim that they were "unaware that the district court was considering material outside the record or that [they] lacked notice of the possibility that the district court would convert the motion [for judgment on the pleadings] into a motion for summary judgment." *In re G. & A. Books, Inc.*, 770 F.2d 288, 295 (2d Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).

Nevertheless, in an abundance of caution, the court has carefully reconsidered the defendants' motion in light of the new evidence presented by the plaintiffs. The court has determined that, even considering the new evidence, plaintiffs have still failed to establish personal jurisdiction over the defendants. Consequently, although plaintiffs' motion for reconsideration is granted, defendants' motion for summary judgment will again be granted.

As the court explained in its October 13, 1988, Memorandum and Order, the Kansas long-arm statute reaches the defendants, but exercising personal jurisdiction over them would violate their constitutional guaranty of due process. Specifically, the court held that the plaintiffs failed to establish the second element of limited personal jurisdiction: that their claim arose out of or resulted from the defendants' forum-related activities. *See, e.g., Rambo v. American Southern Insurance Co.*, 839 F.2d 1415, 1419 n.6 (10th Cir. 1988); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985). In their present motion, plaintiffs list numerous contacts the

defendants and a non-party, Detective Wessler, had with the forum. Namely, the defendants investigated plaintiffs' complaint against Michael Moore in Kansas, the defendants called plaintiffs at their residence in Kansas, Detectives Phelan and Wessler visited plaintiffs in their Kansas home, and Detective Wessler called Michael Moore at his home in Kansas City, Kansas on November 7, 1986, to notify Moore that a warrant for his arrest had been issued. What plaintiffs have failed to show, however, is that any of these contacts are in any way causally related to their injuries. This causal relation between defendants' forum contacts and plaintiffs' injuries is a prerequisite for asserting personal jurisdiction over nonresident defendants. As the First Circuit has explained:

> That the cause of action against a nonresident must have resulted from the defendant's activity makes it clear that not any act of the defendant within the state will suffice. There must be some rational nexus between plaintiff's claim and the activity of the nonresident defendant before it is constitutionally permissible to hold him amenable to suit in that state's courts.

Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 905 (1st Cir. 1980).

Moreover, requiring a causal connection between defendants' forum contacts and plaintiffs' injuries assures that the defendants' due process rights will not be violated. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Supreme Court instructed:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has

> established no meaningful 'contacts, ties or relations.' *International Shoe Co. v. Washington*, 326 U.S. at 319. By requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment), the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,' *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
>
> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that 'arise out of or relate to' those activities, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

Id. at 471-72. Plaintiffs have offered no evidence whatsoever to indicate that defendants' contacts with the forum (*e.g.*, defendants' investigations in Kansas, their telephone calls and visits to plaintiffs' Kansas home) were in any way causally related to the injuries plaintiffs received. Similarly, plaintiffs' evidence concerning Detective Wessler's telephone contact with plaintiffs' assailant, Michael Moore, is insufficient to establish the second element of the three-part test for extending limited personal jurisdiction over the defendants. First, Detective Wessler is not a party to this lawsuit. Second, even if Detective Wessler were a party to this lawsuit, the only

evidence plaintiffs offer to link Detective Wessler's November 7th call to Michael Moore's November 12th actions is a note written by Michael Moore. The court has carefully reviewed this note and finds it offers no evidence of a causal relationship between Detective Wessler's phone call to Michael Moore and Moore's subsequent attack on the plaintiff.

Consequently, the court has reached the same conclusion it previously reached: plaintiffs' injuries were caused by, and their cause of action arises from, the unilateral activities of a third party – Michael Moore. The unilateral activities of a third party are an insufficient basis for personal jurisdiction over the defendants. *See Burger King*, 471 U.S. at 475.

IT IS THEREFORE ORDERED that plaintiffs' motion for reconsideration is granted.

IT IS FURTHER ORDERED that on reconsideration, defendants' motion for summary judgment (converted under Fed. R. Civ. P. 12(c) from a motion for judgment on the pleadings) is granted. The case is dismissed for lack of personal jurisdiction over the defendants.

Dated this 16th day of December, 1988, at Kansas City, Kansas.

/s/ Earl E O'Connor
EARL E. O'CONNOR, Chief Judge

APPENDIX "E"

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives – Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualifications to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned – Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX "F"

60-308. Personal service outside state. (a) *Proof and effect.* (1) Service of summons may be made upon any party outside the state. If upon a person domiciled in this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service of summons within this state; otherwise it shall have the force and effect of service by publication.

(2) The service of summons shall be made (A) in the same manner as service within this state, by any officer authorized to make service of summons in the state where the defendant is served or (B) by sending a copy of the summons and of the petition to the person to be served in the manner provided in K.S.A. 1988 Supp. 60-314 and amendments thereto. No order of a court is required. An affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit or any other competent proofs, in determining whether service has been properly made.

(3) No default shall be entered until the expiration of at least 30 days after service. A default judgment rendered on service outside this state may be set aside only on a showing which would be timely and sufficient to set aside a default judgment rendered on personal service within this state.

(b) *Submitting to jurisdiction – process.* Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal

representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:

(1) Transaction of any business within this state;

(2) commission of a tortious act within this state;

(3) ownership, use or possession of any real estate situated in this state;

(4) contracting to insure any person, property or risk located within this state at the time of contracting;

(5) entering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state;

(6) acting within this state as director, manager, trustee or other officer of any corporation organized under the laws of or having a place of business within this state or acting as executor or administrator of any estate within this state;

(7) causing to persons or property within this state any injury arising out of an act or omission outside of this state by the defendant if, at the time of the injury either (A) the defendant was engaged in solicitation or service activities within this state; or (B) products, materials or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of trade or use;

(8) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations arising for maintenance, child support

or property settlement under article 16 of this chapter, if the other party to the marital relationship continues to reside in the state;

(9) serving as the insurer of any person at the time of any act by the person which is the subject of an action in a court of competent jurisdiction within the state of Kansas which results in judgment being taken against the person;

(10) performing an act of sexual intercourse within the state, as to an action against a person seeking to adjudge the person to be a parent of a child and as to an action to require the person to provide support for a child as provided by law, if (A) the conception of the child results from the act and (B) the other party to the act or the child continues to reside in the state; or

(11) entering into an express or implied arrangement, whether by contract, tariff or otherwise, with a corporation or partnership, either general or limited, residing or doing business in this state under which such corporation or partnership has supplied transportation services, or communication services or equipment, including, without limitation, telephonic communication services, for a business or commercial user where the services supplied to such user are managed, operated or monitored within the state of Kansas, provided that such person is put on reasonable notice that arranging or continuing such transportation services or telecommunication services may result in the extension of jurisdiction pursuant to this section.

(c) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as

provided in subsection (b), may be made by serving the summons upon the defendant outside this state, as provided in subsection (a)(2), with the same force and effect as though summons had been personally served within this state, but only causes of action arising from acts enumerated in subsection (b) may be asserted against a defendant in an action in which jurisdiction over the defendant is based upon this subsection.

(d) Nothing contained in this section limits or affects the right to serve any process in any other manner provided by law.

Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-882

In The

Supreme Court of the United States

October Term, 1990

PAULA PHELAN, an individual and a member of the Kansas City, Missouri Police Department, and RICHARD BERKLEY, ARTHUR D. BROOKFIELD, II, BEVERLEY BARKER NICKS, JOHN L. WILLIAMS, MICHAEL B. MEADE AND LARRY JOINER, as individuals and as Members Constituting THE KANSAS CITY MISSOURI BOARD OF POLICE COMMISSIONERS,

Appellants,

v.

MICHAEL TAYLOR AND BRENDA TAYLOR, in their own right and as parents and natural guardians of MICHAEL ANDREW TAYLOR, a minor, and as the surviving mother and father and surviving heirs at law and co-administrators of the Estate of JESSICA TAYLOR, deceased,

Appellees.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is The Petition For Certiorari Fatally Defective Because It Raises A New Theory Than That Briefed And Argued Below And Because It Raises An Issue That Need Not Be Decided At This Time?

2. Did The Court Of Appeals Err When It Determined That There Were Sufficient Minimum Contacts Such That There Was Personal Jurisdiction Over Defendant?

3. Does The Status Of Defendants As Public Employees Mean That Personal Jurisdiction Over Them Cannot Constitutionally Be Exercised?

CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Appellees agree with appellants' statement.

JURISDICTION

Appellees agree with appellants' statement.

PARTIES

Appellees agree with appellants' statement.

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I.
APPELLEES' ADDITIONS AND OBJECTIONS TO THE STATEMENT OF THE CASE

Plaintiffs respectfully object to defendants' portrayal of their basis for jurisdiction as the solitary contact with Detective Phelan. The fact is, and the record so reflects, that during the three week continuum between the first interview with defendants and the attack, there were dozens of contacts back and forth across the state line. Five of the officers in the Sex Crimes Unit, including the captain, had talked with plaintiffs. Three of these had contact with the assailant, Moore, and at least two of these met with plaintiffs. All of these contacts were with the state of Kansas.

Evidence adduced at deposition and included in the record supported the claim that the Kansas City, Missouri Police Department would routinely investigate cases in Kansas. The police station and courthouse in Kansas City, Missouri, are located closer to plaintiffs' home in the adjacent Kansas City, Kansas than to the scene of the initial incident which occurred in Clay County, Missouri. When Detective Phelan and Detective Wessler came to Kansas to interview Mrs. Taylor, that investigation was performed during their regular shift and pursuant to their regular duties as detectives in the Sex Crimes Unit of the Police Department.

In addition, Det. Wessler contacted the assailant, Moore, at his home in Kansas to notify him that an arrest warrant had been issued for Moore's arrest without the immediate means to effect that arrest. An expert witness on police procedure has termed the action of Det. Wessler "a serious breach of police procedure (which) place the victim in peril, a fact which should have been known to a reasonable police officer." (Court of Appeals decision,

Appendix A, pg. App. 11). A few days later, Moore committed the act complained of. All of these occurred in Kansas.

Plaintiffs will admit that Det. Phelan has testified by affidavit that her contacts with plaintiffs in Kansas were brief and attenuated and only to pick up a medical report. She stated flatly that she did not assure the Taylors of their safety. But the number of telephone calls belies the randomness of the contacts. And Brenda Taylor, in her affidavit, states that Det. Phelan did in fact assure her of safety and for that reason took no substantial further efforts to protect herself against the feared attack.

Det. Phelan's deposition has not been taken at defendants' behest (discovery has not been concluded). But Det. Wessler testified that during his visit with Det. Phelan to plaintiffs' home, they peered out the back window to see the house where Moore lived. It is inconceivable that in that same conversation they did not discuss the Taylors' fear of attack from Moore and the Taylors's safety from that attack.

II.
REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. Summary of Argument

Defendants raise a new theory, a new tact in this Petition that one jurisdiction may not exercise over the employees of another jurisdiction, albeit that those employees injure the residents of the forum jurisdiction. Defendants apparently concede for these purposes that plaintiffs have alleged sufficient facts against them with regard to the tort committed in the forum. They are contending here the constitutional underpinnings to the reasonable exercise of the state long-arm statute. It is

plaintiffs' position, and supported by recent authority and as well the public policy behind it, that defendants' employees should be treated the same as any other government employees in the forum jurisdiction.

Defendants also contend that the insufficiency of allegations made against them individually. But here in plaintiffs' carefully crafted petition, there are sufficient allegations set out supported by the discovery which has transpired in this case.

B. Appellant's Raise a New Theory in Their Petition to the Supreme Court

Plaintiffs' theory here is substantially different than that briefed and argued in District Court and to the Circuit Court of Appeals. The contention before the Tenth Circuit was whether defendants' activities within the forum satisfied the minimum contacts requirement such that they may sue in the forum state. Here, rather, defendants contend that the exercise of jurisdiction over the activities of police employees of an adjacent city constitutes a constitutional deprivation in and of itself. The primary case cited by defendants (where they rely upon the dissenting opinions.), *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) was not even cited to the Court of Appeals.

It is also premature for the Court to consider this new theory. This case comes to this Court from an appeal from the lower court sustaining defendants' motion for judgment on the pleadings. That motion, filed only a month after the pleadings were closed, contended that there was no personal jurisdiction over defendants. As noted, the only question decided by the Circuit Court of Appeals was whether defendants had sufficient minimum contacts in the forum state. The issue concerning liability as governmental employees was not even reached.

This issue is exemplified by *Nevada v. Hall,* the very case that defendants claim supports their proposal. In the initial court determination, the lower court had sustained defendant State's motion to quash service on the jurisdiction issue. That was reversed in the California Supreme Court by a holding that there was jurisdiction. (105 Cal.Rptr. 355, 503 P.2d 1363, 81 ALR3d 1234 (1973)). This Court denied certiorari. 414 U.S. 820, 94 S.Ct. 114, 38 L.Ed.2d 52 (1973).

The case was then tried resulting in a judgment for plaintiff. It was that later judgment that was ruled upon by this Court in the 1979 decision which forms a large part of defendants' case. In the instant case, however, we have not even reached that second phase where appeal to this Court is appropriate.

C. Defendants' Status as Employees of Governmental Entities Should not Defeat Plaintiffs' Right to Bring The Lawsuit in an Otherwise Appropriate Jurisdiction.

Defendants contend by citing dissenting opinions in *Nevada v. Hall,* supra, as well as in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 US 528, 105 S.Ct. 1005, 83 L.Ed.2d 1046 (1985) that jurisdiction over governmental employees should be held to a stricter standard than over the general populace. The contention suffers immediately from lack of logical connection.

It is true that there are imposition of limits on the liability of governmental employees both in Kansas, as well as in Missouri and in most jurisdictions. However, the right to bring suit against such persons where the same would be permitted against private persons is well documented.

The basis of jurisdiction here is the Kansas long-arm statute, K.S.A. 60-308(b)(2), which provides in standard fasion that "the commission of a tortious act within this

State" either "in person or through an agent or instrumentality" will provide a jurisdictional basis for suit against the perpetrator. The lower court found and as recognized by the Court of Appeals (App. 7), that defendants had acceded to the jurisdiction of Kansas for the purpose of the Kansas long-arm statute.

Defendants appear to concede that they are subject to the Kansas long-arm statute. They do dispute the constitutional underpinnings to that Act in asserting that it is a violation of due process for them to have been sued in Kansas. Yet, to hold that employees of a sister state could not be sued in Kansas in tort would result in granting them greater immunity than enjoyed by governmental employees of Kansas who had committed the same act. *Hall v. University of Nevada,* 105 CalRptr 355, 503 P.2d 1363, 81 ALR3d 1234, 1238 (1972), cert. denied 414 US 820, 94 S.Ct. 114, 38 LEd2d 52.

Defendants finally contend that because the defendants here are state employees, that as a matter of comity, this court should balance interests and public policy in the respective jurisdictions. But it is immediately apparent here again defendants raise choice of law questions when the lower courts dealt only with jurisdiction.

Even if this appeal is concerned with competing state laws, the tort here occurred in Kansas. The rule is that a state is not bound to enforce a sister state's law in face of its own statute, particularly when there is strong public policy to support it. *Nevada v. Hall,* supra, 440 US at 422; *Pacific Employers Insurance Company v. Industrial Accident Commission,* 306 US 493, 59 S.Ct 629, 83 LEd 940 (1938).

The public policy in favor of enforcement of Kansas law could not be stronger. The enactment of the Kansas Tort Claims Act came about as a result of litigation

following the catastrophic airplane crash which devastated the University of Wichita football team. Initially the Kansas Supreme Court invalidated governmental immunity, but in the second opinion, *Brown v. Wichita State University*, 219 Kan. 2, 547 P.2d 1015 (1976), the Court reconsidered and upheld governmental immunity but with reservations. In his concurring opinion, Chief Justice Fatzer expressed his fear that the decision of the court may go unheralded. He stated further:

> "I can only hope that, instead, the Legislature will respond to this decision of the court with a critical and searching re-examination of these statutes. An abundance of evidence is at hand which convincingly demonstrates it is both desirable and feasible that government at all levels accept increased responsibility for its actions. I look forward to the day the Legislature enacts new measures more in keeping with the needs of Kansas citizens and Kansas government." *Brown,* supra, 219 Kan. at 40.

The Kansas Legislature responded with adoption of the Tort Claims Act two years later, effective in 1979.

D. There is Jurisdiction in the Forum State Over Defendants Members of the Board of Police Commissioners in Their Individiual Capacities.

Defendants contend that plaintiffs have failed to allege and show sufficient allegations against the members of the Board of Police Commissioners acting in their individual capacities. They complain they are bound, if at all, vicariously only in their official capacities.

Defendants ignore the fact that the claims against the particular Board Members are not by virtue of a vicarious relationship, but rather because they individually "knew

or should have known of the issuance and maintenance of improper policies or the failure of others to obey proper policies that allowed Michael Moore to remain free and cause injury and damage to plaintiffs." (Petition, Par. 22) This would both be true of plaintiffs' claims at common law and by virtue of the Tort Claims Act, and, as well under 42 U.S.C., Sec. 1983. A defendant may be personally involved in a deprivation because he or she created a policy or custom in violation of constitutional rights, or allowed such a policy to continue. *Turpin v. Mailet,* 619 F.2d 196 (2d Cir., 1980), cert. denied 449 US 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980).

As noted, plaintiffs contend and have submitted evidence that notifying a suspected child molester of his impending arrest without being able to effect that arrest is a negligent act. That this was a result of the continuance of an improper policy is supported by the fact that despite repeated discovery requests, defendants have as yet failed to reveal a policy or guideline to prevent it.

III.
CONCLUSION

E. The Question Before the Court is Whether There are Sufficient Minimum Contacts; Plaintiffs' Burden is Only Minimal.

It should be clearly apparent that plaintiffs had both alleged and proved sufficient contacts—the numerous telephone calls, the visit to plaintiffs' home on Halloween night, the contact of Det. Phelan that night with the assailant Moore, the telephone call from Wessler to Moore—that defendants be subject to personal jurisdiction in Kansas. After revewing the factual circumstances, the Court of Appeals found that personal jurisdiction existed.

In rebuttal, defendants point to only two portions of plaintiffs' Petition and a statement taken out of context in a routine discovery request. Defendants have ignored the statement in paragraph 18 where plaintiffs describe the contacts and visit of Detective Phelan. And they further ignore the contention in that same paragraph and paragraph 20 of the Petition where plaintiffs allege that by reason of the assurance of safety by all of the telephone contacts and the visit to plaintiffs' home, that a special relationship had developed. While it is true that plaintiffs did not mention Detective Wessler's telephone call or his visit to Kansas at the time of drafting the petition, they were not sure who made the telephone call and were unaware that it was Wessler who came to Kansas with Phelan. This latter fact was denied in defendants' answers to the initial sets of interrogatories. It was not until Wesler's deposition that these matters came to light. At that point, while defendants' motion was pending but

within the applicable statute of limitations, plaintiffs' attorney notified defendants' attorney that he intended to make Wessler a defendant. The lower court's order dismissing the action was issued a few days later.

The question before this Court is the one ruled upon below, whether defendants' agents had sufficient minimum contacts with the forum state in order that defendant may be sued there. While plaintiffs admit that the burden of proof is theirs, it is only a minimal burden. *Ammon v. Kaplow,* 468 F.Supp. 1304 (D. Kan. 1978). When a motion as this is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.,* 710 F.2d 1449 (10 Cir., 1983). The allegations in the complaint must be taken as true to the extent they are uncontroverted, and all factual disputes are to be resolved in the plaintiffs' favor. *American Land Program,* supra; *Behagen v. Amateur Basketball Association of U.S.A.,* 744 F.2d 731 (10 Cir. 1984).

The Petition of Certiorari should be denied because the decision of the Court of Appeals does not involve a substantial federal question but instead focuses on the par-

ticular factual allegations of this case. Moreover, defendants have attemped to change their theory of appeal at the last minute and by so doing are asking the Court to consider matters not fully addressed below.

Respectfully submitted,

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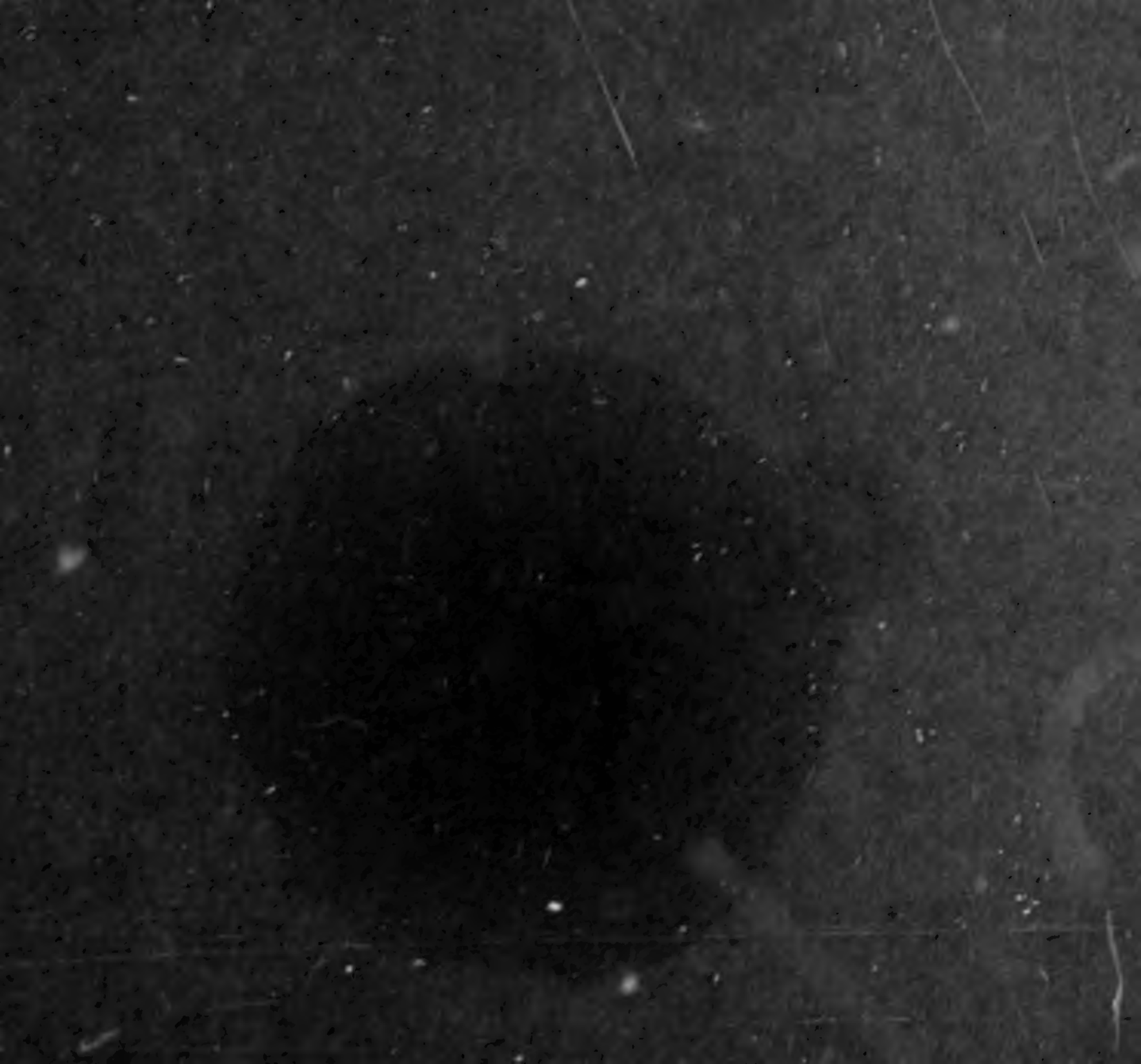
Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that five copies of the foregoing were mailed to Mr. J. Emmett Logan, Morrison, Hecker, Curtis, Kuder & Parrish, 14 Corporate Woods, 8717 West 110th Street, Suite 520, P.O. Box 25217, Overland Park, Kansas 66225-5217, attorneys for Petitioners, on this 28th day of December, 1990.



Supreme Court, U.S.
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(3)

No. 90-882

In The

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PAULA PHELAN, et al.,

Petitioners,

vs.

MICHAEL TAYLOR, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

Respondents' Statement of the Case is misleading and inaccurate in its characterization of the nature and level of contacts between defendants and the State of Kansas.

Officers of the Kansas City, Missouri Police Department had contact with plaintiffs and their assailant, Michael Moore, in addition to those two discreet isolated occurrences on which the Tenth Circuit based its opinion. However, each of those other contacts occurred either in Missouri or through telephone exchanges initiated by plaintiffs with representatives of the Department in Missouri. Plaintiffs argue that "these contacts were with the State of Kansas." Brief in Opposition at 1. That statement is accurate only in the sense that plaintiffs and Moore were residents of Kansas at the time that they initiated contact with defendants in Missouri.

Respondents' Brief in Opposition is also misleading on the issue of whether defendants raised below the arguments on which they base their Petition here. In fact, defendants made the same arguments below and devoted an entire subsection of their Tenth Circuit Brief to the issues presented in the Petition.

ARGUMENT

I. DEFENDANTS ADEQUATELY RAISED BELOW THE ARGUMENT THAT BECAUSE THEY ARE STATE AGENTS, DUE PROCESS PREVENTS THE EXERCISE OF JURISDICTION OVER THEIR PERSONS.

Defendants' position has been consistent throughout this litigation. Based upon all of the facts and

circumstances alleged by plaintiffs, there are insufficient minimum contacts upon which to base the exercise of personal jurisdiction consistent with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution. One of the facts and circumstances which defendants have always contended the courts must take into account is defendants' status as agents of the State of Missouri. Any difference in emphasis of that factor here as compared to below results from defendants' desire to focus upon the importance of the issue in order to demonstrate the reasons the Court should grant certiorari.

The basic premise of defendants' Petition is that the Court should grant certiorari to demonstrate that due process prohibits the exercise of long-arm jurisdiction over the agents or agencies of a State where the cause of action is based upon allegations that defendants deficiently discharged their sovereign responsibilities and their forum related contacts are merely incidental to efforts to perform those responsibilities. While defendants argued in the district court and in the court of appeals that their contacts with the State of Kansas were insufficient to provide a basis for the exercise of personal jurisdiction under any circumstances, the assertion that their status as agents and agencies of the State of Missouri must be taken into account is by no means new.[1]

The Summary of Argument in defendants' Tenth Circuit Brief explained that plaintiffs' allegations failed to

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[1] Even had the argument not been raised below, the Court would not be precluded from considering it. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

demonstrate defendants had purposefully availed themselves of the privilege of conducting activities within the State of Kansas and that plaintiffs' claim was based rather on the unilateral activity of Michael Moore. The Summary then introduced the argument on which defendants' Petition here is based, stating:

> Furthermore, the exercise of jurisdiction in this case would be highly unreasonable considering the extent of the resulting conflict with the sovereignty of the state for which defendants act as agents.

Brief of Defendants-Appellees at 6. Defendants then divided their due process argument into three subsections, dealing with minimum contacts, purposeful activity, and the reasonableness of exercising jurisdiction under the circumstances. The third argument focused exclusively on defendants' character as state agents and agencies, on the relationship between sister states as coequal sovereigns, and on the potential impact of a rule that would subject state defendants to long-arm service of process under the circumstances of this case. That argument is set forth below:

> C. The Exercise of Personal Jurisdiction Over Defendants Would Not Be Reasonable.
>
> The consequences of accepting plaintiffs' arguments on these jurisdictional issues are immense. It is not reasonable to expect that either the perpetrator of, the victims of, or the witnesses to a crime will always remain in the jurisdiction in which the crime was committed. Therefore, the investigative activities of state law enforcement officers will often have consequences that extend beyond state lines. Each

state has been and should be free to fashion its own method of apportioning liability for any injurious consequences of the investigative activity of its law enforcement agencies through development of the public duty doctrine, sovereign immunity, and official immunity.

Plaintiffs seek to deprive the State of Missouri and the City of Kansas City, Missouri, of their control of these issues where investigative activities of Kansas City, Missouri Police officers allegedly cause injury, through the acts of a third-party, in Kansas. But the duties defendants are alleged to have breached herein are duties that arise by operation of Missouri law and are limited in territorial impact by the borders of the State of Missouri. Mo. Rev. Stat. §§ 84.420.1, 84.440, 84.710, 544.020; Rule 22.02(e), Mo. R. Crim. P.; *Rustici v. Weidemeyer*, 673 S.W.2d 762, 770 (Mo. banc 1984); *Settle v. State*, 679 S.W.2d 310, 317 (Mo. App. 1984). For a forum state to exercise long-arm jurisdiction under those circumstances constitutes an attempt by the forum state to establish itself as the superior to the other state. *Cf. World-Wide Volkswagen Corp., supra* at 291-92.

Such a violation of the defendant state's sovereignty is especially egregious if, as plaintiffs have argued, the forum state can then impose its own versions of public duty, sovereign immunity, and official immunity on the defendant state. Accepting plaintiff's arguments in this regard would result in a system wherein one state can dictate to the other the circumstances under which it will be held liable to citizens of the forum state in instances where the only contact between the forum state and the defendant state is the conduct of a third-party in committing crimes in both jurisdictions. In doing so, the forum state will seize control of such decisions as how many police officers,

> prosecutors, and judges must be employed by the defendant state to avoid liability that might be incurred through the failure to apprehend and process criminals in what the forum state might consider to be a timely manner, what jail and prison facilities must be built and how long convicts should be kept there to eliminate danger to the public, and how much the taxpayers of the defendant state are required to pay for protection from crimes for themselves and for citizens of neighboring states. Due process will not countenance such a result.

Brief of Defendants-Appellees at 26-28. Thus, there is no basis for plaintiffs' assertion that defendants have advanced a new theory here.

Plaintiffs are also wrong to assert that the issues presented by defendants' Petition are premature. The Petition does not request the Court to decide on the merits whether defendants can constitutionally be stripped of the sovereign and official immunities that are attributes of their positions as agents and agencies of the State of Missouri. Rather, it provides the Court with an opportunity to place critical limits on the scope of its holding in *Nevada v. Hall*, 440 U.S. 410 (1979), through a construction of the due process clause that would protect state agents and agencies from being required to respond in a foreign State to allegations that they have failed to perform their governmental responsibilities. The argument is addressed solely to personal jurisdiction.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari, the Court should grant the Writ.

Respectfully submitted,

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